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No._____

In The
Supreme Court of the United States
October Term, 1992

PAUL DELO, SUPERINTENDENT
Potosi Correctional Center,
Petitioner,

v.

FREDERICK LASHLEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM L. WEBSTER
Attorney General
State of Missouri

RONALD L. JURGESON
Assistant Attorney General
Counsel of Record

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 531-4207
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE A STATE TRIAL COURT TO INSTRUCT THE JURY ON A SPECIFIC STATUTORY MITIGATING CIRCUMSTANCE (THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY) WHEN THE CRIMINAL DEFENDANT PRESENTS NO AFFIRMATIVE EVIDENCE DURING THE GUILT PHASE OR THE PUNISHMENT PHASE OF THE CRIMINAL TRIAL (THEREBY LEAVING A "BLANK SLATE" BEFORE THE JURY) TO SUPPORT THE INSTRUCTION AND WHEN THE PENALTY PHASE INSTRUCTIONS AS A WHOLE ALLOW THE JURY TO CONSIDER AND GIVE EFFECT TO ANY MITIGATING CIRCUMSTANCE?

II.

WHETHER A STATE TRIAL JUDGE'S OMISSION TO INSTRUCT THE JURY ON A MITIGATING CIRCUMSTANCE CAN BE CONSIDERED A HARMLESS ERROR WHEN REVIEWED IN A FEDERAL HABEAS CORPUS ACTION?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

ARGUMENT 7

I. A STATE TRIAL COURT HAS NO CONSTITUTIONAL DUTY TO INSTRUCT THE JURY ON A SPECIFIC STATUTORY MITIGATING CIRCUMSTANCE (THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY) WHEN THE CRIMINAL DEFENDANT PRESENTS NO AFFIRMATIVE EVIDENCE DURING THE GUILT PHASE OR THE PUNISHMENT PHASE OF THE CRIMINAL TRIAL (THEREBY LEAVING A "BLANK SLATE" BEFORE THE JURY) TO SUPPORT THE INSTRUCTION AND WHEN THE PENALTY PHASE INSTRUCTIONS AS A WHOLE ALLOW THE JURY TO CONSIDER AND GIVE EFFECT TO ANY MITIGATING CIRCUMSTANCE. 7

II. A STATE TRIAL JUDGE'S OMISSION TO INSTRUCT THE JURY ON A MITIGATING CIRCUMSTANCE CAN BE CONSIDERED HARMLESS ERROR AND, IN THIS CASE, IS HARMLESS UNDER ANY STANDARD OF REVIEW 21

CONCLUSION 30

APPENDIX
(under separate cover)

APPENDIX 1: The March 4, 1992, Opinion of the United States Court of Appeals for the Eighth Circuit A-1

APPENDIX 2: The July 1, 1992, Order denying the petition for rehearing or rehearing en banc ... A-22

APPENDIX 3: The July 20, 1992, Judgment of the United States District Court for the Eastern District of Missouri A-23

APPENDIX 4: The December 13, 1989 Order of the United States District Court for the Eastern District of Missouri A-24

APPENDIX 5: The December 13, 1989, Memorandum of the United States District Court for the Eastern District of Missouri A-25

APPENDIX 6: The January 3, 1989 Order of the United States District Court for the Eastern District of Missouri A-28

APPENDIX 7: The June 9, 1988 Order of the United States District Court for the Eastern District of Missouri A-30

APPENDIX 8: Portions of the March 29, 1988 Report and Recommendation of United States Magistrate A-32

APPENDIX 9: The March 20, 1984 opinion of the Supreme Court of Missouri in respondent's direct appeal A-39

APPENDIX 10: Petitioner's Petition for Rehearing or Rehearing *en banc* filed in the United States Court of Appeals for the Eighth Circuit A-49

APPENDIX 11: The May 14, 1987 petition for a writ of habeas corpus filed on behalf of respondent in the United States District Court for the Eastern District of Missouri A-64

APPENDIX 12: Missouri Revised Statute, Section 565.012, 1982 Supplement A-78

APPENDIX 13: Portion of the transcript from the original criminal trial (including punishment phase instruction conference and punishment phase closing argument) A-82

APPENDIX 14: Missouri Approved Instruction - Criminal (Second Edition) -- Number 15.44 ... A-102

APPENDIX 15: Missouri Approved Instruction - Criminal (Second Edition) -- Number 15.46 ... A-106

TABLE OF AUTHORITIES

Cases **Page(s)**

Arizona v. Fulminante, 111 S.Ct. 1246 (1991) 21, 24

Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990) 28

Boyde v. California, 110 S.Ct. 1190 (1990) 10

Brecht v. Abrahamson, 944 F.2d 1363 (7th Cir. 1991) *cert. granted*, 112 S.Ct. 2937 (1992) 21

Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985) 14

Byrd v. Delo, 94 F.2d 1226 (8th Cir.), *stay denied*, 112 S.Ct. 17 (1992) 15

Chapman v. California, 386 U.S. 18 (1967) 23, 24

Clemmons v. Mississippi, 110 S.Ct. 1441 (1990) 24

Cupp v. Naughten, 414 U.S. 141 (1973) 28

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 24

Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1834 (1990) 23, 25

Eddings v. Oklahoma, 455 U.S. 104 (1982) 11, 13, 22

Estelle v. McGuire, 112 S.Ct. 475 (1991) 14, 18, 28

Franklin v. Lynaugh, 487 U.S. 164 (1988) 10

Graham v. Collins, 950 F.2d 1009 (5th Cir.), *cert. granted*, 112 S.Ct. 2937 (1992) 10

Hamilton v. Nix, 809 F.2d 463 (8th Cir.) (*en banc*), *cert. denied*, 483 U.S. 1023 (1987) 23

Hitchcock v. Dugger, 481 U.S. 391 (1987) 22, 23, 25

Hopper v. Evans, 456 U.S. 605 (1982) 12, 23

Hutchins v. Garrison, 724 F.2d 1425 (4th Cir. 1983), *cert. denied, stay denied*, 464 U.S. 1065 (1984) ..... passim

Jones v. Murray, 947 F.2d 1106 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1591 (1992) 14, 28

Lashley v. Armontrout, 957 F.2d 1495 (8th Cir. 1992) ..... passim

Lashley v. State, 721 S.W.2d 31 (Mo.App., E.D. 1986), *cert. denied*, 481 U.S. 1024 (1987) 6

Lewis v. Jeffers, 110 S.Ct. 3092 (1990) 14, 15

Lockett v. Ohio, 438 U.S. 586 (1978) ..... passim

Parker v. Dugger, 111 S.Ct. 731 (1991) ..... passim

Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 939 (1986) 28

Penry v. Lynaugh, 109 S.Ct. 2934 (1989) ..... passim

People v. Cornett, 33 Cal.2d 33, 198 P.2d 877 (1945) 18

Rose v. Clark, 478 U.S. 570 ..... 23, 24, 25

Sawyer v. Whitley, 112 S.Ct. 2514 (1992) 25

Skipper v. South Carolina, 476 U.S. 2 (1986) 22

Sochor v. Florida, 112 S.Ct. 2114 (1992) 24

State v. Battle, 661 S.W.2d 487 (Mo. banc), *cert. denied*, 466 U.S. 993 (1984) 12

State v. Daugherty, 631 S.W.2d 637 (Mo. 1982) 12

State v. Guzman, 100 N.M. 756, 676 P.2d 1321 (1984), *cert. denied*, 467 U.S. 1256 (1984) 18

State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981) 17

State v. Lashley, 667 S.W.2d 712 (Mo. banc), *cert. denied*, 469 U.S. 873 (1984) ..... passim

State v. Stokes, 630 S.W.2d 715 (Mo. banc 1982), *cert. denied*, 460 U.S. 1017 (1983) 25

Teague v. Lane, 489 U.S. 288 (1989) 19

Wainwright v. Goode, 464 U.S. 78 (1983) 15, 18, 19

Walton v. Arizona, 110 S.Ct. 3047 (1990) 10, 13, 16

Whisensant v. State, 482 So.2d 1241 (Ala. 1983) 29

Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986) 36

Woodson v. North Carolina, 428 U.S. 280 (1976) 21

Wright v. West, 112 S.Ct. 2482 (1992) 14, 19

Zant v. Stephens, 462 U.S. 862 (1983) 11

Constitutional Provisions, Statutes & Rules

U.S. Const. Amend VIII ..... passim

U.S. Const. Amend XIV ..... passim

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2201(c) 2

28 U.S.C. § 2254(d) 16

Supreme Court Rule 10.1(a) 8, 19

Supreme Court Rule 10.1(c) 8, 10, 24

Supreme Court Rule 13.1 2

Supreme Court Rule 14.1(b) 2

Supreme Court Rule 35.3 2

Ariz.Rev.Stat.Ann. § 13-703(C)(1991) 18

Cal. Penal Code §1105(a) (West Cum Supp. 1992) 18

Conn.Gen.Stat. § 53a-46a(c) 18

Mo. Revised Statute §565.001 (1978) 3

Mo. Revised Statute §565.012 (1982 Supplement) 2

Mo. Revised Statute §565.012.3(1) (1982 Supplement) ... 7

Mo. Supreme Court Rule 27.26 (repealed) 6

Nev.Rev.Stat. §175.554.1 (1991) 18

N.C.Gen.Stat. §15A-2000(b)(Michie 1988) 18

42 Pa.Cons.Stat.Ann. §9711(c)(1)(ii) (Cum.Supp. 1991) 18

S.C.Code Ann. §16-3-20(c) (Law. Co-op. Cum.Supp. 1991) 18

Tenn.Code Ann. §39-13-204(e)(1991) 18

MAI-CR 2d 15.44 ..... passim

MAI-CR 2d 15.46 ..... 11, 26, 28

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit reversing and remanding respondent's sentence of death is reported at 957 F.2d 1495 (8th Cir. 1992). The opinion of the Court is reprinted in slip opinion form in the appendix (Appendix -- hereinafter "App." -- at A-1 - A-21). The judgment and orders of the United States District Court for the Eastern District of Missouri, Eastern Division are not reported. The various opinions of the District Court are included in the appendix (App. A-24, A-25 - A-27, A-28 - A-29, A-30 - A-31).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on March 4, 1992 (App. A-1). Superintendent Delo's petition for rehearing or rehearing en

banc was denied by the Court of Appeals on July 1, 1992 (App. A-22). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rule 13.1, the present petition for a writ of certiorari was required to be filed by petitioner[1] within 90 days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Missouri Revised Statute, §565.012 (1982 Supplement)

---

[1] Current petitioner Paul K. Delo is respondent's custodian since respondent's transfer from the Missouri State Penitentiary in Jefferson City, Missouri, to the Potosi Correctional Center in Mineral Point, Missouri.

is reproduced in the appendix (App. A-78 - A-81).

STATEMENT OF THE CASE

Respondent, Frederick Lashley, was convicted of capital murder, §565.001, Missouri Revised Statute (1978) (Repealed October 1, 1984), for which he was sentenced to death by the Circuit Court of the City of St. Louis, Missouri. The circumstances surrounding respondent's crime were summarized by the Missouri Supreme Court on direct appeal.

> Defendant Frederick Lashley, 17, was convicted of the capital murder of his physically handicapped 55-year-old cousin and foster mother, Janie Tracy, while robbing her of $15. The punishment prescribed by the jury and approved by the trial court is death. We affirm.
>
> The victim lived alone in a downstairs apartment in the City of St. Louis. She had heart trouble, diabetes and a neuromuscular problem that caused her to limp and required her to use a walking cane. She had difficulty walking since she had undergone a brain operation a number of years ago. The operation had resulted in the removal of a portion of her skull on the left side of her head. Defendant had lived with and been cared for by Miss Tracy (and her mother) from the time he was two years of age until he was sixteen years old. He had been present on occasions when there had been discussions concerning the soft spot on Miss Tracy's head.
>
> On the night of April 9, 1981, Miss Tracy was visiting her sister, Mrs. Williams, who lived several blocks from the Tracy apartment. Sometime before 8:30 p.m., defendant entered

the apartment by climbing through the top of a window on the rear porch. He unscrewed the light bulb in the front room so that the light would not come on when the switch was turned on. His admitted purpose was to ambush Miss Tracy and take her money when she returned home. Defendant, armed with a cast iron skillet (and the jury could reasonably find he also had a butcher knife having a seven and one-half inch blade), waited in the dark in the bedroom adjacent to the front room.

Miss Tracy left her sister's home between 8:00 and 8:30 p.m., driving her car. In his confessions to the police, one of which was videotaped, defendant stated that when Miss Tracy entered the front door of the apartment she attempted to turn on the light. When the light did not come on she started into the room where defendant was waiting. As she reached for the light switch he struck her in the head with the iron skillet, breaking it into two pieces. He said she fell and began screaming and he put his hand over her mouth. When asked where the knife came from the defendant stated:

> Off the floor. It was on-well, really it was on the floor. That's-I mean, you know, I just see the knife and then I grabbed it, you know. And then she had it in her hand. We both had it. And then I finally got it-got it back and then that's when I stuck her with it.

Defendant took $15 and car keys from Miss Tracy's purse, locked the front door on the way out of the apartment, and drove off in the victim's automobile. He was apprehended while

driving the stolen vehicle shortly after midnight.

An upstairs neighbor of Miss Tracy, Mrs. Ali, 81, had heard screams followed by something which sounded "like a fall" from the downstairs apartment. She telephoned the Tracy apartment and when she did not get an answer, called Mrs. Williams to come over and investigate. Mrs. Williams and her husband went to her sister's apartment shortly after 8:30 p.m. Mrs. Williams noticed her sister's car was not parked outside. She had a key to the apartment and upon entering it, saw her sister on the floor of the bedroom, bleeding about the head. She also saw a butcher knife near Miss Tracy and a broken skillet on the bedroom floor. Police and medical assistance were immediately summoned.

Hospital records showed Miss Tracy was comatose and brain dead when she arrived at the hospital. She had a cut on her head above the right ear, "defense" knife cuts on her fingers, and a one-inch incision above her left ear where the knife entered her skull through the soft spot and penetrated her brain. This stab wound caused her death approximately 48 hours later.

Defendant did not testify at trial but his written and videotaped confessions were introduced by the State. In both he admitted striking the defenseless woman with the skillet with sufficient force to knock her down and then plunged the butcher knife into her head.

State v. Lashley, 667 S.W.2d 712, 713-715 (Mo. banc) (footnote omitted), *cert. denied*, 469 U.S. 873 (1983). On the basis of the evidence introduced at trial, the jury found respondent guilty of capital murder. In a separate penalty phase of the trial, the

same jury found the existence of a statutory aggravating circumstance: to-wit, that the defendant murdered Janie Tracy for the purpose of receiving money or any other thing of monetary value. The jury assessed capital punishment as respondent's penalty. The Missouri Supreme Court upheld the conviction and sentence on direct appeal. *Id.*

Respondent Lashley then sought post-conviction relief pursuant to former Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988). Respondent's post-conviction motion was denied by the Circuit Court of the City of St. Louis, Missouri. The appeal to the Missouri Court of Appeals was denied. ***Lashley v. State***, 721 S.W.2d 31 (Mo.App., E.D. 1986), *cert. denied*, 481 U.S. 1024 (1987).

Lashley then began the federal attack upon his conviction and sentence. Petitioner filed a petition for a writ of habeas corpus on May 14, 1987, in the United States District Court for the Eastern District of Missouri (App. A-64 - A-77). After several stages of litigation, United States District Judge Edward L. Filippine denied each allegation contained in respondent's petition (App. A-24, A-25 - A-27, A-28 - A-29, A-30 - A-31). The District Court granted a certificate of probable cause for appeal.

On appeal, the United States Court of Appeals for the Eighth Circuit found, in a two-one decision, that respondent was denied a protection of the Eighth Amendment because the Missouri trial court refused to give a mitigating-circumstance instruction that had been requested. ***Lashley v. Armontrout***, 957 F.2d 1495, 1501-1502 (8th Cir. 1992) (App. A-1 - A-21).

Petitioner's petition for rehearing or rehearing en banc was denied by the court of appeals on July 1, 1992 (App. A-22). The present petition for a writ of certiorari ensues.

ARGUMENT

I.

A STATE TRIAL COURT HAS NO CONSTITUTIONAL DUTY TO INSTRUCT THE JURY ON A SPECIFIC STATUTORY MITIGATING CIRCUMSTANCE (THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY) WHEN THE CRIMINAL DEFENDANT PRESENTS NO AFFIRMATIVE EVIDENCE DURING THE GUILT PHASE OR THE PUNISHMENT PHASE OF THE CRIMINAL TRIAL (THEREBY LEAVING A "BLANK SLATE" BEFORE THE JURY) TO SUPPORT THE INSTRUCTION AND WHEN THE PENALTY PHASE INSTRUCTIONS AS A WHOLE ALLOW THE JURY TO CONSIDER AND GIVE EFFECT TO ANY MITIGATING CIRCUMSTANCE.

A St. Louis City, Missouri jury convicted respondent Lashley of capital murder. Respondent was then denied relief by the Supreme Court of Missouri on direct appeal, the Circuit Court of the City of St. Louis in a post-conviction proceeding, the Missouri Court of Appeals for the Eastern District on post-conviction appeal, and the United States District Court in a federal habeas corpus action. On the appeal from the district court's decision, a three-judge panel of the United States Court of Appeals for the Eighth Circuit -- in a two-to-one vote -- overturned the sentence on the basis of a perceived Eighth Amendment violation during the penalty phase of the criminal proceeding.

The Court of Appeals ruled that it was an error of constitutional dimension for the Missouri trial court to have refused to give a mitigating-circumstance instruction requested by respondent. The requested instruction would have told the jury they could consider as a mitigating factor that the defendant "has no significant history of prior criminal activity." §565.012.3(1), Missouri Revised Statutes (Supp. 1982). ***Lashley***

v. Armontrout, 957 F.2d 1495, 1501 (8th Cir. 1992). Two judges of the panel held that Eighth Amendment principles, as defined in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), "obligated the Missouri trial court to give the requested instruction, if it was warranted by the evidence." *Lashley*, 957 F.2d at 1501. The two-judge majority went on to hold that under the facts of respondent's case, the evidence warranted the instruction. *Id.*, at 1501-1502.

The decision of the two-judge majority conflicts with this Court's Eighth Amendment jurisprudence, overlooks Missouri law governing the procedures applied in capital cases, and creates a direct conflict among federal Circuit Courts of Appeal. These serious errors by the Court of Appeals provide sufficient reasons for this Court to exercise its power of discretionary review and to grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Supreme Court Rule 10.1(a), 10.1(c). The analysis of the Court of Appeals in this case makes it clear that further guidance is needed from this Court as to the applicability of the Eighth Amendment to questions relating to state procedural rules concerning the jury's consideration of potentially mitigating evidence.

A. **The Eighth Amendment (as applied to the states through the Fourteenth Amendment) does not require submission of an instruction listing a specific statutory mitigating circumstance unless the criminal defendant provides support for the instruction with competent evidence.**

In its ruling, the Court of Appeals has inappropriately blended Eighth Amendment concepts with Missouri procedural rules. The panel held:

> *Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it. The evidence before the jury in this case presented a blank slate. As far as the jury was concerned, Lashley had no significant history of prior criminal activity, and, therefore, he was entitled to have the jury consider that fact as a mitigating circumstance. The trial judge's failure to give the requested instruction under these circumstances violated the defendant's Eighth Amendment rights as expressed in *Lockett*.

Lashley, 957 F.2d at 1501. To be sure, in *Lockett* this Court held:

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant *proffers* as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. at 604 (emphasis added, footnote omitted). Superintendent Delo does not dispute that holding. But *Lockett* has not been the last word on mitigating circumstances; it does not even address the separate question of jury instructions. The court of appeal's failure even to recognize this Court's subsequent, more applicable, decisions reflects a possible methodological flaw in the opinion mandating review by this Court.

Contrary to the court of appeals' opinion, *Lockett* does not mandate instructing on a mitigating factor that has not been supported by *evidence* presented by the defendant. This Court has determined that the instructions must allow the sentencer to consider and give effect to any mitigating "evidence" presented by the defendant. *See Penry v. Lynaugh*, 492 U.S. 302, 318-319 (1989). Apparently this inference is not so clear as to

be understood by the Eighth Circuit in this case.[2] Superintendent Delo understands ***Penry*** as extending only to its facts -- a situation in which the defendant has presented "evidence" to support a mitigating factor.

This Court should now, therefore, specifically address the question of whether the jury must be given an instruction on statutory mitigating evidence when the instruction is not supported with affirmative evidence having been presented during the criminal trial or sentencing proceeding.[3] This issue is one of importance throughout the country as several states use statutes and instruction rulings similar to the ones at issue from Missouri. Supreme Court Rule 10.1(c).

The Court has expressly held that "***Lockett*** does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." ***Franklin v. Lynaugh***, 487 U.S. 164, 181 (1988) (plurality opinion). "There is no . . . constitutional requirement of unfettered sentencing discretion in the jury and states are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" ***Walton v. Arizona***, 110 S.Ct. 3047, 3056 (1990), *quoting*, ***Boyde v. California***, 110 S.Ct. 1190, 1196 (1990). The Court has also noted that "the Constitution does not require a State to adopt specific standards for instructing the jury in its

[2] Recently certiorari review was granted in ***Graham v. Collins***, 950 F.2d 1009 (5th Cir.), *cert. granted*, 112 S.Ct. 2937 (1992). This action indicates the ***Penry*** decision is unclear to the circuit courts of appeal.

[3] The Court has recognized that it is not constitutionally impermissible to require a defendant to bear the burden of non-persuasion so long as the state is not relieved of proving any element of the offense or the existence of necessary aggravating circumstances. ***Walton v. Arizona***, 110 S.Ct. 3047, 3055 (1990). Here, respondent did not meet the burden of Missouri law which required the introduction of *some* evidence to support his requested mitigating circumstance.

consideration of aggravating and mitigating circumstances." ***Zant v. Stephens***, 462 U.S. 862, 890 (1983); *see also id.*, at 875, n. 13.

As Judge Fagg noted in his dissenting opinion, ". . . the court mistakenly concludes ***Lockett*** obligated the state trial judge to give Lashley's requested mitigating circumstance instruction even though the record did not contain a shred of evidence to support it." ***Lashley***, 957 F.2d at 1503 (Fagg, J., dissenting). Judge Fagg also correctly discussed the interplay between Missouri's procedural rules and the Eighth Amendment dictates discussed in ***Lockett***, *supra*; ***Eddings v. Oklahoma***, 455 U.S. 104 (1982); and ***Penry v. Lynaugh***, 492 U.S. 302 (1989).

The charge to the jury in respondent Lashley's case did allow the jurors to consider and give effect to *any* evidence that might be considered mitigating. Missouri Approved Instruction - Criminal, Second Edition (MAI-CR 2d) 15.44 and 15.46 (*See* App. A-102 - A-105, A-106). In addition to specifically listing all statutory mitigating circumstances that are supported with some evidence, Missouri procedure requires that the jury be instructed that they can consider "any circumstances which you find from the evidence in extenuation or mitigation of punishment." MAI-CR 2d 15.44 and Note on Use 5 (App. A-103, A-105).[4]

It has been recognized that sentencing jurisdictions may require that mitigating circumstance instructions be supported by some evidence. The dissent states the rule, correctly, as being that "[d]ue process requires that state trial courts give mitigating circumstance instructions only when the evidence warrants those

[4] If, after the jury has considered and given effect to any evidence in extenuation or mitigation of punishment, the aggravating circumstances are found to outweigh all mitigation factors, the jury is not compelled to return a sentence of death. The jury is provided with a "life option" instruction under Missouri procedure. MAI-CR 2d 15.46 (App. A-106).

instructions." ***Lashley***, 957 F.2d at 1502. In support of this rule the reader is referred to ***Hopper v. Evans***, 456 U.S. 605, 611 (1982). *Id*. In ***Hopper***, this Court addressed the analogous issue of a lesser-included-offense instruction, and held (in pertinent part) that "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction" (emphasis in original). What unites the rule cited from ***Hopper*** and the point Judge Fagg made in the instant case is that the giving of jury instructions--even in a capital case--is to be decided according to the facts of the case and the law of the sentencing jurisdiction.[5]

Assuming that the record before the jury did present a "blank slate" relating to Lashley's prior criminal history, the Eighth Amendment question becomes whether "no" evidence should be considered as a mitigating factor (thereby placing the burden on the state to disprove its existence) or whether the defendant should have an affirmative burden, as state law provides, to present *something* to support the instruction. With this case the Court can fashion a specific rule to be applied in federal review of state-court capital punishment convictions and sentences.

Under Missouri procedure, an instruction may be given only if it is supported by the evidence. ***State v. Battle***, 661 S.W.2d 487, 492 (Mo. banc 1983), *cert. denied*, 466 U.S. 993 (1984); ***State v. Daugherty***, 631 S.W.2d 637, 639 (Mo. 1982). In fact, the Notes on Use to the Missouri instruction on this issue (MAI-CR 2d 15.44) (App. A-102 - A-105) specifically authorizes submission of the instruction only "if there is

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[5] It is evident that confusion exists as to whether the question before the Court of Appeals was one based on due process of the Fourteenth Amendment or one based upon Eighth Amendment principles. The confusion becomes even more evident when review is undertaken for harmless error. *See infra* Argument II. This case provides an excellent opportunity for this Court to clarify the law.

evidence supporting" statutory mitigating circumstances or any mitigating circumstance or circumstances "authorized by law." *See* MAI-CR 2d 15.44, Notes on Use 3, 4 (App. A-103 - A-104). In deciding respondent's issue on direct appeal, the Missouri Supreme Court found that there was "no evidence to support the statutory mitigating circumstance . . .." ***State v. Lashley***, 667 S.W.2d 712, 715-716 (Mo. banc), *cert. denied*, 469 U.S. 873 (1984).

Respondent Lashley was not prohibited from presenting any potential mitigating evidence to the jury in this case. Instead, Lashley made a reasonable strategic decision to forego presentation of evidence on his claimed lack of criminal history and thereby alleviate any possible rebuttal by the prosecution involving, as one Missouri Supreme Court judge noted, "other felonies committed by the defendant while an adult . . .." ***State v. Lashley***, 667 S.W.2d at 717 (Blackmar, J., concurring in part and dissenting in part).[6] The choice made by respondent, however, does not violate the precepts of ***Lockett v. Ohio***, 438 U.S. at 604; *see also* ***Eddings v. Oklahoma***, 455 U.S. at 112; ***Penry v. Lynaugh***, *supra*.

As the dissent correctly points out in discussing the issue here, this Court has held "the constitution is not violated when a state requires capital defendants to bear [the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases]." ***Lashley***, 957 F.2d at 1503 (Fagg, J., dissenting opinion), *citing*, ***Walton v. Arizona***, 110 S.Ct. 3047, 3055 (1990) (plurality); *see also id*., 110 S.Ct. at 3066-3068 (Scalia, J., concurring).

Under this Court's previous rulings on Eighth

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[6] The majority of the Missouri Supreme Court also recognized that while respondent was "in custody for the present offense he told officers he had committed several felonies after attaining adult status." ***State v. Lashley***, 667 S.W.2d at 716.

Amendment issues, the majority in respondent's appeal proceeding has missed the mark. A writ of certiorari should issue to define application of the Eighth Amendment to jury instruction questions dealing with mitigation evidence.

B. **Because the Eighth Amendment contains no requirement concerning procedures for submitting instructions to the jury, this case should have been decided primarily on state-law grounds**.

Neither the Eighth Amendment nor any other source of federal law mandates the holding reached by the United States Court of Appeals. It is axiomatic that "federal habeas corpus relief does not lie for errors of state law." ***Estelle v. McGuire***, 112 S.Ct. 475, 480 (1991), *quoting*, ***Lewis v. Jeffers***, 110 S.Ct. 3092, 3102 (1990).

On surprisingly similar facts, the United States Court of Appeals for the Fourth Circuit has determined that the failure of a state trial court "to tell the jury that it could consider the defendant's clean criminal record as a mitigating factor . . ." would at most be ". . . an error of state law which is not cognizable by a federal court." ***Hutchins v. Garrison***, 724 F.2d 1425, 1436-1437 (4th Cir. 1983), *cert. denied, stay denied*, 464 U.S. 1065 (1984); *see also* ***Briley v. Bass***, 750 F.2d 1238, 1244 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985); ***Jones v. Murray***, 947 F.2d 1106, 1119-1120 and n. 11 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1591 (1992).

Failing to give deference to the reasonable, good-faith decision of the Missouri Supreme Court in considering this allegation, the Court of Appeals has incorrectly decided this issue. Superintendent Delo is well aware of the fact this Court has recently attempted to address the question of "whether a federal habeas court should afford deference to state-court determinations applying law to the specific facts of a case." ***Wright v. West***, 112 S.Ct. 2482, 2486 (1992). Since the Court did not ultimately answer that question in ***Wright***, this case would

provide an excellent opportunity to further consider the issue.

As previously discussed, the Missouri Supreme Court engaged in an extensive and reasonable discussion of this allegation as it was presented on the direct appeal of respondent's judgment of conviction and sentence. ***State v. Lashley***, 667 S.W.2d at 715-716.[7] Certainly, it cannot be said that the Eighth Circuit is in any *better* position to decide this issue than were the judges of the Supreme Court of Missouri.[8]

It has been traditionally recognized that great deference to state court determinations will be given on issues relating to the existence of aggravating factors. ***Lewis v. Jeffers***, 110 S.Ct. at 3102. In ***Parker v. Dugger***, 111 S.Ct. 731 (1991), Justice White wrote that there should be no difference between the consideration of "state court conclusions regarding mitigating circumstances as opposed to those regarding aggravating factors." *Id*. at 742 (White, J., dissenting). Except for the fact that the present case concerns consideration of mitigating evidence and not aggravating factors, the issue here is not substantially different than the one decided in ***Wainwright v. Goode***, 464 U.S. 78 (1983).

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[7]Again, as Judge Blackmar noted in his separate opinion, "[t]here are indications in the record before us of other felonies committed by the defendant while an adult ... ." *Id*. at 717 (Blackmar, J., concurring in part, dissenting in part). Lashley could not gather even one vote from the Missouri Supreme Court to support his position that there was evidence to support the submission of his requested instruction. That reasonable, good-faith decision of the Supreme Court of Missouri should have been given deference in the federal courts.

[8] In fact, Chief Judge Richard S. Arnold, the author of the majority opinion in this case, has recently remarked in another capital punishment case from the State of Missouri that "for our purposes, 'state law' is what the Supreme Court of Missouri says it is." ***Byrd v. Delo***, 942 F.2d 1226, 1232 (8th Cir.), *stay denied*, 112 S.Ct. 17 (1991).

In ***Goode***, this Court determined that the Eleventh Circuit had exceeded its habeas corpus authority in finding an Eighth Amendment violation when an aggravating circumstance claim had been fully, and arguably correctly, considered by the Florida Supreme Court. The decision found that the issue was either one of state law not reviewable in a collateral proceeding, ***Goode***, 464 U.S. at 83-84, or was an issue of historical fact which should have been given deference under 28 U.S.C. §2254(d). *Id.*, at 84-87.

While the concept of a federal court giving deference on a mixed issue of law and fact is quite different than deciding a purely state law claim, it is important to recognize that the *procedures* used to provide Eighth Amendment protection in state trials are set by the individual States. As Justice Scalia properly noted in ***Walton v. Arizona***, the Eighth Amendment "does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment." ***Walton***, 110 S.Ct. at 3066 (Scalia, J., concurring); *see also* ***Parker v. Dugger***, 111 S.Ct. at 743 (White, J., dissenting). When the state's procedures do not preclude consideration of mitigating evidence, the state court's determination on the Eighth Amendment question should be entitled to deference. This Court should provide an answer to the question left open in ***Wright*** by granting certiorari in this case.

C. **The Eighth Circuit in this opinion has created a direct conflict between the opinion in this case and the Hutchins decision from the Fourth Circuit.**

In ***Hutchins v. Garrison***, 724 F.2d at 1436-1437, the United States Court of Appeals for the Fourth Circuit held the failure of a state trial court "to tell the jury that it could consider the defendant's clean criminal record as a mitigating factor . . ." would at most be ". . . an error of state law which is not cognizable by a federal court." *Id.* The federal habeas corpus action in the analogous capital case from the State of North Carolina presented nearly the same question for

determination decided by the Eighth Circuit here.

In ***Hutchins***, the North Carolina Supreme Court phrased the inmate's issue on direct appeal as being "that the trial court erred in failing to submit the mitigating circumstance that defendant did not have a significant history of prior criminal activity." ***State v. Hutchins***, 303 N.C. 321, 356, 279 S.E.2d 788, 809 (1981). Undeniably, the question in ***Hutchins*** presents substantially the same issue for decision as confronted the Missouri Supreme Court in 1984.[9]

The North Carolina Supreme Court found that "[s]ince defendant did not go forward with evidence in this regard, nor was there any evidence introduced by the state on this point, the trial court was not obligated to instruct the jury on this mitigating circumstance on its own motion." ***State v. Hutchins***, 303 N.C. at 356, 279 S.E.2d at 809. The ruling from North Carolina is certainly in line with the decision by the Missouri Supreme Court.

> Defendant's position is refuted by the italized [sic] language contained in MAI-CR 2d 15.44 which specifically states statutory mitigating circumstances are to be supported by the evidence. ... There being no evidence to support the statutory mitigating circumstance, the trial court correctly refused defendant's proffered instruction.

State v. Lashley, 667 S.W.2d at 715-716.

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[9] In the present case, the Missouri Supreme Court wrote, "[d]efendant contends the court committed reversible error in refusing to give his tendered instruction on mitigating circumstances which included the mitigating circumstance of defendant having no significant history of prior criminal activities." ***State v. Lashley***, 667 S.W.2d at 715.

It would only make sense that when the highest courts of two states decide almost exactly the same issue in almost exactly the same way, the federal courts reviewing those issues would come to compatible results. In this instance they have not.[10] If a capital defendant has a right to a mitigation instruction in the absence of even a scintilla of evidence to support it, this windfall should be because this Court has found the Constitution of the United States requires it, not on account of the fortuity of committing his crime in the Eighth Circuit.

Missouri and North Carolina are not unique in their rule requiring a burden to be borne by the criminal defendant before mitigating evidence will be considered. *See* ***State v. Guzman***, 100 N.M. 756, 764, 676 P.2d 1321, 1329 (1984), *cert. denied*, 467 U.S. 1256 (1984); ***People v. Cornett***, 33 Cal.2d 33, 198 P.2d 877 (1945). *See generally* Ariz.Rev.Stat.Ann. § 13-703(C) (1991) ("[t]he burden of establishing the existence of the [mitigating] circumstances is on the defendant"); Cal. Penal Code §1105(a) (West Cum.Supp. 1992); Conn.Gen.Stat. § 53a-46a(c); Nev.Rev.Stat. §175.554.1 (1991); N.C.Gen.Stat. §15A-2000(b) (Michie 1988); 42 Pa.Cons.Stat.Ann. §9711(c)(1)(ii) (Cum.Supp. 1991); S.C.Code Ann. §16-3-20(C) (Law. Co-op. Cum. Supp. 1991); Tenn.Code Ann. §39-13-204(e) (1991).

This type of inconsistency cannot stand. Litigants in the states under the Eighth Circuit's jurisdiction now have a federal law hurdle to leap that does not stand in the way of states in the Fourth Circuit -- or, to Superintendent Delo's knowledge, in any other circuit.

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[10] The Fourth Circuit found the issue to be one of state law. ***Hutchins v. Garrison***, 724 F.2d at 1437. That result comports with this Court's recent decision in ***Estelle v. McGuire***, 112 S.Ct. at 481-484. *See* ***Wainwright v. Goode***, 464 U.S. at 382[1]. The Eighth Circuit found, though, that the issue was one of constitutional concern and, in fact, violative of the Eighth Amendment. ***Lashley v. Armontrout***, 957 F.2d at 1501-1502.

The decision of the Fourth Circuit in ***Hutchins*** makes it clear this issue is one of state law and not one subject to Eighth Amendment attacks. *See also* ***Wainwright v. Goode***, 464 U.S. at 83-87; ***Parker v. Dugger***, 111 S.Ct. at 741-743 (White, J., dissenting). The conflict between the opinion in this case and the Fourth Circuit decision in ***Hutchins v. Garrison***, 724 F.2d at 1436-1437, needs to be resolved by this Court. Supreme Court Rule 10.1(a).

Finally, this Court should grant certiorari review in this case to determine whether the decision of the Eighth Circuit "... breaks new ground or imposes a new obligation on the States or the Federal Government." ***Teague v. Lane***, 489 U.S. 288, 301 (1989). Assuming, *arguendo*, the Eighth Amendment does require what the court of appeals claims it does, the presumption is that the rule of constitutional law would not apply to Lashley's case.

Under nearly the same facts, the Fourth Circuit has held that the issue in this case is primarily one of state law. ***Hutchins v. Garrison***, 724 F.2d at 1436-1437. The conflicting -- and diametrically opposed -- opinion in the case at bar must be said to create a new rule of constitutional law under ***Teague***. Of course, as a new rule of law, it should not be applied to respondent's case which is on collateral appeal unless it fits within one of the very narrow exceptions from ***Teague***. ***Wright v. West***, 112 S.Ct. at 2500-2503 (Souter, J., concurring in judgment).

The result in this case is not the same as that reached by this Court in ***Penry v. Lynaugh***, 492 U.S. 302 (1989). In ***Penry***, the Court was confronted with a situation wherein the criminal defendant had presented evidence to support the giving of the instructions refused by the trial court. ***Penry***, 492 U.S. at 318-319. To extend ***Penry*** (or the Court's earlier Eighth Amendment cases such as ***Lockett*** and ***Eddings***) to include the facts of this case may be right (as two judges of the Eighth Circuit said) or wrong (as the dissenting judge and

Superintendent Delo say), but it is certainly "new." Unless the prisoner can show that his case falls within one of the two exceptions from ***Teague***, the Eighth Circuit panel's decision violates this Court's directions in ***Teague*** and its progeny.

This ***Teague*** issue should have prevented the court of appeals from addressing any constitutional issue in this case. This Court should accept discretionary review of this case to correct the ***Teague*** violation.[11]

Under the above arguments, it is clear that guidance needs to be given to the lower courts concerning application of Eighth Amendment principles to state court determinations and the interplay between the state's procedural rules and the federal constitutional requirements. This case provides the opportunity for such guidance.

[11] Superintendent Delo is cognizant of the fact respondent may reply that the ***Teague*** issue was not briefed in the district court or in the appellee's brief before the Eighth Circuit. The district court decision was rendered before this Court's opinion in ***Teague*** was handed down. After having prevailed at that level, petitioner felt the district court's decision was not only correct but properly based on prevailing theories of constitutional law not requiring a ***Teague*** defense to be needed in the court of appeals. ***Teague*** was raised in the petition for rehearing (App. A-55 - A-56, n. 1).

II.

A STATE TRIAL JUDGE'S OMISSION TO INSTRUCT THE JURY ON A MITIGATING CIRCUMSTANCE CAN BE CONSIDERED HARMLESS ERROR AND, IN THIS CASE, IS HARMLESS UNDER ANY STANDARD OF REVIEW.

Even assuming, *arguendo*, that the Eighth Circuit reached the proper decision under this Court's Eighth Amendment jurisprudence, the court's decision was incomplete. Assuming that the state trial court committed a constitutional violation by refusing to give the unsupported mitigating circumstance instruction concerning respondent Lashley's visionary lack of a significant history of prior criminal conduct, the Court should use this case as an opportunity to decide whether collateral relief will lie in the absence of consideration for harmless error of the assumed violation, and what standard such harmless error review should be undertaken.[12]

A. Eighth Amendment errors relating to the submission of mitigating-circumstance instructions should be subject to review under a harmless error analysis.

This Court "has recognized that most constitutional errors can be harmless." ***Arizona v. Fulminante***, 111 S.Ct. 1246, 1263 (1991). At least in the area of applying that rule to cases involving consideration of mitigation evidence by a jury, however, it is not clear what standard of review -- if any -- might be appropriate. In two of the first decisions on mitigation evidence after ***Woodson v. North Carolina***, 428 U.S. 280 (1976), the Court did not reach the issue of what the proper level of

[12] The Court has recently agreed to review a similar question from a Seventh Circuit case. ***Brecht v. Abrahamson***, 944 F.2d 1363 (7th Cir. 1991), *cert. granted*, 112 S.Ct. 2937 (1992). The question presented in that case deals with applying harmless error to a prophylactic rule.

scrutiny would be for deciding whether an error was harmless. *See* ***Lockett v. Ohio*** *supra*; ***Eddings v. Oklahoma***, *supra*. Later, in ***Skipper v. South Carolina***, 476 U.S. 2 (1986), the Court interpreted the State's argument that the mitigating evidence was cumulative to mean that the State was seeking application of some type of harmless error analysis. ***Skipper***, 476 U.S. at 9. The Court ruled that the exclusion of the mitigating evidence was "sufficiently prejudicial to constitute reversible error" because it was "reasonably likely that the exclusion of evidence ... may have affected the jury's decision." *Id*. It is unclear, however, whether the contrary is true, *i.e.*, that if the exclusion of mitigating evidence is not reasonably likely to have effected the jury's decision then the sentence is constitutionally permissible. The Court implicitly acknowledges this possible confusion as to the proper standard by concluding, "[t]hus, under *any* standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error." *Id*. at 1673 (emphasis added).[13] As a result, the ***Skipper*** holding provides little guidance for cases similar to the one before the Court calling for a standard by which to analyze the impact of the failure to give a mitigating circumstance instruction.

The Court's opinion in ***Hitchcock v. Dugger***, 481 U.S. 391 (1987), confirms Superintendent Delo's understanding that an "absolute reversal" rule should *not* apply in the instant case. The case, though, did not spell out the specific standard to apply. Like ***Skipper***, that case involved the unconstitutional exclusion of mitigating evidence (rather than, as here, the refusal of an instruction which was unsupported by affirmative evidence) during the penalty phase. A unanimous Court intimated that such an error may be saved, stating that "[r]espondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing

[13] Also implicit in the Court's language in ***Skipper*** is the fact that under a different factual situation *some* type of harmlessness review would be possible.

judge." *Id*. at 399. In stating these exceptions as alternatives, the Court seems to acknowledge that reversal on the basis of such a constitutional error concerning mitigating circumstances may be avoided by either the "harmless error" doctrine[14] or what may best be characterized as a "due process" or "no prejudice" standard.[15]

At least one of the United States Courts of Appeals has interpreted the Court's opinion in ***Hitchcock*** to require the application of a harmless beyond a reasonable doubt analysis to unconstitutional exclusions of mitigating evidence. *See* ***Demps v. Dugger***, 874 F.2d 1385, 1389-1390 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1834 (1990), *citing*, ***Chapman v. California***, 386 U.S. 18 (1967). In ***Demps***, the Eleventh Circuit set forth the standard as follows:

> To be harmless in the ***Hitchcock*** context, the court must determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence.

Demps v. Dugger, 874 F.2d at 1390. Although this Court has not given such a succinct definition of any harmless error standard for the situation present in this case, the ***Demps*** standard can be reconciled with the various dicta from Supreme Court opinions. The Court should take this opportunity to provide definitive guidance on what standard is to be applied.

[14] *See generally* ***Chapman v. California***, 386 U.S. 18 (1967).

[15] *See* ***Hitchcock v. Dugger***, 481 U.S. at 399; *see e.g.* ***Hamilton v. Nix***, 809 F.2d 463, 470 (8th Cir.)(*en banc*), *cert. denied*, 483 U.S. 1023 (1987). In ***Hopper v. Evans***, 456 U.S. 605 (1982), this Court cited ***Chapman*** and applied what might be best characterized as a "no prejudice" test. *See* ***Rose v. Clark***, 478 U.S. 570, 577. The "no prejudice" analysis is similar to the review undertaken in the Eighth Circuit for due process claims. ***Hamilton v. Nix***, *supra*.

It is recognized that application of harmless error analysis to trial error is necessary to "preserve the 'principle that the central purpose of a criminal trial is to decide the factual questions of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" ***Arizona v. Fulminante***, 111 S.Ct. at 1264; *quoting* ***Delaware v. Van Arsdall***, 475 U.S. 673, 681 (1986); *see also* ***Rose v. Clark***, 478 U.S. 570, 578-579 (1986).

Furthermore, this Court has held that harmless error analysis is appropriate on habeas corpus review of Eighth Amendment challenges to penalty phase instructions dealing with aggravating factors, ***Clemmons v. Mississippi***, 110 S.Ct. 1441, 1451 (1990);[16] ***Sochor v. Florida***, 112 S.Ct. 2114 (1992).

As Justice White stated in ***Parker v. Dugger***, 111 S.Ct. 731, "I see no reason to differentiate between state court conclusions regarding mitigating circumstances as opposed to aggravating factors." *Id.* at 742 (White, J., dissenting). Similarly, there is no reason to apply a harmless error test to aggravating factors while requiring the harshness of an "automatic reversal" standard for mitigation questions. The importance of this issue needs to be addressed by this Court. Rule 10.1(c). A writ of certiorari should issue.

B. <u>Applying a harmless beyond a reasonable doubt standard to the facts in this case leaves no doubt that respondent's sentence was appropriate</u>.

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[16] In ***Clemmons***, the Court went so far as to state "[a]lthough the court applied the proper 'beyond a reasonable doubt' standard, *see* ***Chapman v. California***, 386 U.S. 18 (1967) . . .." ***Clemmons v. Mississippi***, 110 S.Ct. at 1451. In ***Fulminante***, the Court expressly recognized that ***Chapman*** had been applied in ***Clemmons*** to the issue of "unconstitutionally overbroad jury instructions at the sentencing stage of a capital case." ***Arizona v. Fulminante***, 111 S.Ct. at 1263.

Application of the harmless error rule to the case before the Court would leave the original jury verdict intact, because the mitigating circumstance instruction, even if given, would carry such little weight that it is certain beyond a reasonable doubt that the sentencer would have imposed the death sentence. Apart from the single missing factor in the mitigation instruction, the jury was fully instructed that they could consider any and all evidence in mitigation before arriving at the final punishment decision (App. A-102 - A-105). *Cf.* ***Rose v. Clark***, 478 U.S. at 579. The jury was also instructed they could return a sentence of life imprisonment even if they believed the aggravating factors were stronger in this case than the mitigating circumstances (App. A-106).

The assumed constitutional error in this case is harmless if Superintendent Delo can show beyond a reasonable doubt that submission of the requested instruction would not have influenced the jury to return a life sentence. *See* ***Demps v. Dugger***, 874 F.2d at 1390; *cf.* ***Hitchcock v. Dugger***, 481 U.S. at 398-399. Because the harmless error analysis deals directly with the process by which the death penalty is imposed, one must apply the harmless error rule with an understanding of the particular sentencing jurisdiction's procedures -- here, the procedures of the State of Missouri.

Missouri's capital sentencing scheme first requires the sentencer to decide whether one of the enumerated statutory aggravating circumstances is present. If one of those factors is present beyond a reasonable doubt, then the criminal defendant becomes "eligible"[17] for the death penalty. ***State v. Stokes***, 638 S.W.2d 715, 724 (Mo. banc 1982), *cert. denied*, 460 U.S. 1017 (1983). The jury then determines whether the aggravating circumstances outweigh the mitigating factors and in this determination the jury is allowed to consider all possible

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[17] *See* ***Sawyer v. Whitley***, 112 S.Ct. 2514, 2522-2523 and n. 15 (1992).

factors, not just those included in the jury instructions.

In Lashley's case, the jury found the existence, beyond a reasonable doubt, of one statutory aggravating circumstance: the jury found the murder was committed for pecuniary gain. ***State v. Lashley***, 667 S.W.2d at 714-715. Respondent was eligible for the death penalty upon that finding. The two-step process employed in Missouri allows a criminal defendant both to contest the existence of aggravating circumstances, and then -- if at least one is found -- to argue that the aggravating circumstance is outweighed by relevant mitigating factors.

The next question, then, was whether the jury's consideration of all evidence in aggravation and all evidence in mitigation would result in a finding that mitigating evidence outweighed aggravating evidence so as to *require* a life sentence. *See* MAI-CR 2d 15.44 (App. A-102 - A-105). Finally, even if the jury determined that respondent did not have sufficient evidence in mitigation to outweigh the viciousness of his crime, they were still not compelled to fix the punishment at death. MAI-CR 2d 15.46 (App. A-106).

In the penalty phase procedure as defined by Missouri law, it is clear the jury had ample opportunity to return a sentence of life imprisonment in this case. Respondent's argument was not that additional evidence in mitigation could have been presented to the jury; the argument was only that an *additional* factor should have been enumerated in the middle of an instruction that was given to the jury for consideration.

The court of appeals based its decision on a premise the record presented an evidentiary "blank slate." ***Lashley v. Armontrout***, 957 F.2d at 1501. The facts comprising this blank slate are not nearly as compelling for mitigation as the majority would lead one to believe. Respondent Lashley had only been an adult for thirty (30) days when he killed his cousin and guardian, Ms. Tracy. His lack of a significant prior criminal history only extended for one month as only offenses committed

as an adult are germane to this mitigating circumstance.

More importantly, the Supreme Court of Missouri noted that there was evidence the "[w]hile in custody for the present offense he told officers he had committed several felonies after attaining adult status." ***State v. Lashley***, 667 S.W.2d at 716. Even if this evidence was not before the jury in the guilt phase of the trial, *see* ***State v. Lashley***, 667 S.W.2d at 717 (Blackmar, dissenting), the record could easily have been made to include this information if the prosecution felt Lashley would otherwise have the benefit of an unsupported instruction to the contrary. Not only would such evidence effectively refute respondent's assertion that he should be granted mitigation of his sentence because of his alleged lack of criminal history, it would strengthen the jury's original determination that respondent be given a sentence of death.

In any event, in the instant case the absence of prior criminal convictions does not mean that the prisoner was free from a "significant history of prior criminal activity." The distinction between juvenile adjudications and criminal convictions relates to the legal consequences of an act, not to the essence of the act. The rule of Missouri law forbidding the use of juvenile adjudications as evidence in Missouri trial courts does not make the activity a person was found to have committed any less odious. That rule of law stems from a policy to promote rehabilitation of the offender at the cost of denying triers of fact relevant evidence in later cases. In the instant case, it would have been contrary to fact for the trial judge to have instructed the jury that the prisoner had "no significant history of prior criminal activity." Respondent Lashley may have had the right to have the juvenile adjudications excluded from the evidence in aggravation, but he did not have the right to a windfall instruction which was disaffirmed by his behavior. Far from having created unfair prejudice for the prisoner, the trial judge's refusal of a specific, contrary-to-fact instruction -- coupled with the less specific mitigation instructions and the silent record -- was probably the most equitable disposition of

this matter.

As this Court has repeatedly recognized, in reviewing jury instructions, a single incident may not be revived in artificial isolation, but must be viewed in the context of the overall charge. ***Cupp v. Naughten***, 414 U.S. 141, 146-147 (1973); ***Estelle v. McGuire***, 112 S.Ct. at 482.

Taken as a whole, it cannot be said that there is "a reasonable likelihood" that the jury has been deprived of consideration of any mitigating factor. In fact, in addition to specifically being instructed that they could consider the age of the defendant at the time of the offense as a mitigating circumstance, the jury was also instructed that they could consider "any circumstances" which were found from the evidence "in extenuation or mitigation of punishment." MAI-CR 2d 15.44 (App. A-102 - A-105). The jury was also provided with a specific "life-option" instruction in this case which read:

> Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

MAI-CR 2d 15.46 (App. A-106).

Even in the absence of a specific listing of the mitigating circumstance in question (lack of significant history of prior criminal activity), the full charge submitted to the jury by the circuit court comports with constitutional requirements. *See* ***Blystone v. Pennsylvania***, 110 S.Ct. 1078, 1084 (1990); ***Jones v. Murray***, 947 F.2d 1106, 1119-1120 (9th Cir. 1991) *cert. denied*, 112 S.Ct. 1591 (1992); *cf.* ***Peek v. Kemp***, 784 F.2d 1479, 1491-1493 (11th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 939 (1986). The jury in this case was given the opportunity to consider and give effect to any factor they felt would have mitigated punishment in this case.

If this evidentiary "blank slate" -- as the court of appeals terms it -- is so significant that it is evidence for the purpose of satisfying the majority's ***Lockett*** analysis, then it cannot have been lost on the jury. The trial judge instructed the jury that it could consider in mitigation "any circumstances" found from the evidence. For the very reason the court of appeals relies on in striking down the judgments of the jury, the trial judge, the Missouri Supreme Court on direct appeal and the federal district court--*i.e.*, the substantive salience of the absence of serious prior criminal activity--the jury may not blithely be presumed to have ignored it. Yet, that is the effect of the federal appellate court's holding on this issue: from the fact that no evidence of serious prior criminal activity was presented to the jury, and the law (undisputed by any participant in these proceedings) that the jury could consider this circumstance, the Eighth Circuit has leaped to the result that the trial court had to instruct on this specific mitigating circumstance -- in addition to giving the more inclusive mitigating-circumstance instruction and the life-option instruction. What the present case establishes as the law is not that the jury may consider the absence of serious prior criminal activity, but that it must be specially instructed to do so--even when defense counsel does not proffer, through reasonable trial strategy, such evidence to the jury.

The sentence given to respondent by the St. Louis City jury in 1982 would not have been different even if the jury had been given one additional mitigating circumstance which was unsupported by any evidence respondent presented during the guilt or punishment phases of the criminal trial.

CONCLUSION

Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

WILLIAM L. WEBSTER
Attorney General

RONALD L. JURGESON
Assistant Attorney General
Counsel of Record

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 531-4207
(816) 531-0231 FAX

Attorneys for Petitioner.